

No. 85-258

IN THE SUPREME COURT OF THE STATE OF MONTANA

1985

*ULP 38-80*

JERRY T. KLUNDT,

Plaintiff and Appellant,

-vs-

STATE OF MONTANA, ex rel., BOARD OF  
PERSONNEL APPEALS and CHAUFPEURS,  
TEAMSTERS and HELPERS UNION,

Defendants and Respondents.

APPEAL FROM: District Court of the Thirteenth Judicial District,  
In and for the County of Yellowstone,  
The Honorable William J. Speare, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Cate Law Firm; Brad L. Arndorfer, Billings, Montana

For Respondent:

R. Scott Currey, Dept. of Labor & Industry, Helena,  
Montana  
D. Patrick McKittrick; McKittrick Law Firm, (Union),  
Great Falls, Montana

Submitted on Briefs: Oct. 3, 1985

Decided: January 2, 1986

Filed: JAN 2 - 1986

*Ethel M. Harrison*

Clerk

Mr. Justice William E. Hunt, Sr. delivered the Opinion of the Court.

The appellant, Klundt, appeals from an order of the Yellowstone County District Court granting respondents' motions to dismiss for failure to state a claim upon which relief can be granted.

The order granting the Board of Personnel Appeal's motion to dismiss is affirmed, and the order granting the Union's motion to dismiss is reversed.

On appeal, the appellant raises the following issues:

(1) Whether the District Court erred in granting respondents' motions to dismiss for failure to state a claim where a three-year delay between the filing of a grievance and a hearing was allegedly caused by Union interference and Board delay.

(2) Whether the District Court erred in denying appellant's Rule 52(b), M.R.Civ.P. motion to amend.

Appellant worked for the City of Billings as a city service worker from October 31, 1977, until June 26, 1978, and as an equipment operator from June 26, 1978, until February 19, 1979. He was then promoted to city service foreman I. He was demoted to equipment operator on March 17, 1980.

Appellant filed an unfair labor practice charge with the Montana Human Rights Commission against the City on March 19, 1980. Appellant voluntarily terminated his employment with the City on June 10, 1980. On August 24, 1983, the Commission issued its lack of reasonable cause finding. Appellant does not contest this finding.

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Appellant filed an unfair labor practice charge with the Montana Human Rights Commission against the City on March 19, 1980. Appellant voluntarily terminated his employment with the City on June 10, 1980. On August 24, 1983, the Commission issued its lack of reasonable cause finding. Appellant does not contest this finding.

Around October 17, 1980, the City posted notice to fill a vacant position for a systems maintenance worker II. Appellant applied to the City to fill this position, but was not hired. Appellant then filed grievances with the Board of Personnel Appeals (Board) on September 8, 1980, and November 5, 1980. He alleged that in not rehiring him to fill the vacant position, the City was discriminating against him for filing the unfair labor practice charges with the Human Rights Commission the previous March. A hearing was held on December 6, 1983, and the hearing examiner recommended the case be dismissed. On November 28, 1984, the Board made its final order adopting the hearing examiner's recommendation.

On April 11, 1984, appellant began the present action alleging that his Union breached a duty of fair representation in handling his unfair labor practice charge, and alleging the Board denied him a timely hearing in violation of his due process rights. The Union filed a motion to dismiss claiming that appellant's complaint failed to state a claim against the Union upon which relief could be granted. The Board filed a motion to dismiss alleging that appellant failed to exhaust his administrative remedies and that his complaint failed to state a claim upon which relief can be granted. On April 9, 1985, the District Court granted both motions to dismiss. On April 16, 1985, appellant filed a motion to amend the judgment pursuant to Rule 52(b), M.R.Civ.P. This motion was denied on April 25, 1985.

A motion to dismiss should not be granted unless it appears beyond doubt that the non-moving party can prove no set of facts entitling him to relief. *Willson v. Taylor* (Mont. 1981), 634 P.2d 1180, 38 St.Rep. 1606. All

well-pleaded allegations of the non-moving party are deemed to be true.

Appellant alleges that from the time he filed his charges against the City until the hearing in December 1983, approximately 37 months, appellant contacted the Union and requested the Union to help him force the Board to take action in the matter. The Union informed appellant that it was up to the State to take action. However, Klundt claims that the Union itself requested the Board to put the matter "on hold." Because of the Union's refusal to help the appellant, the Board took no action on his charges for over three years.

While a union owes its members a duty of fair representation in areas covered by collective bargaining, section 39-31-205, MCA; Ford v. University of Montana (1979), 183 Mont. 112, 598 P.2d 604, it is not required to represent members outside of collective bargaining. Klundt was not attempting to resolve his claim through binding arbitration or internal union procedures. Instead, he filed charges with the Board of Personnel Appeals, a state agency.

Klundt alleges that the Union requested the Board to put his charges on hold. Even if the Union does not owe Klundt a duty of fair representation in this case, that does not mean the Union has the right to affirmatively interfere with appellant's unfair labor practice charges. Whether the charges themselves are meritorious or not, a three-year delay may have prejudiced the appellant's handling of his claim. In its argument before this Court, the Union argues that Klundt requested it to ask the Board to put the matter on hold, but there is no evidence in the District Court record to support that argument. Klundt claims the delay was caused

by Union interference. If discovery or evidence at trial fails to support Klundt's claim, the Union may obtain a summary judgment or a directed verdict. We cannot say that as a matter of law Klundt can prove no set of facts stating a claim against the Union.

Turning to appellant's allegations against the Board, Klundt claims that from the time he filed his charges until a hearing was held, he made numerous written and oral demands to the Board for a hearing. The Board failed to set a hearing for 37 months. The Board repeatedly stated that Klundt's charges had been put on hold at the request of the Union. Klundt alleges that this delay violated his due process rights under the state and federal constitutions.

The District Court properly granted respondent Board's motion for summary judgment. In Montana, the right to due process requires notice and an opportunity to be heard. *State v. Redding* (Mont. 1984), 675 P.2d 974, 41 St.Rep. 147; *Nygard v. Hillstead* (1979), 180 Mont. 524, 591 P.2d 643; *Montana State University v. Ransier* (1975), 167 Mont. 149, 536 P.2d 187. The requirements are the same whether dealing with an administrative agency or a court. Section 2-4-601, MCA, and section 2-4-612(1), MCA. In this case, the Board fulfilled the fundamental requirements of due process. Klundt received notice and was given an opportunity to be heard. The three-year delay is disturbing, but not fatal.

According to section 2-4-701, MCA, "a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." An agency's failure to act constitutes agency action. Under this statute, Klundt could have petitioned this Court to require the Board to hold

a hearing. The petitioner in State ex rel. Great Falls Gas Co. v. Department of Public Service Regulation, Public Service Commission, et al. (1976), 169 Mont. 68, 544 P.2d 815, faced a similar situation. The Public Service Commission failed to act on petitioner's request for an interim rate increase. The company petitioned this Court and we held that "the neglect, failure, or refusal of the . . . Commission to act on petitioner's application for an interim increase in rates . . . , constitutes arbitrary action on the part of said Commission." Great Falls, 544 P.2d at 815. We then ordered the Commission to act on petitioner's application for rate increase. The same procedure was available to appellant. For three years, appellant dealt with the Union or the Board, yet the Board failed to act. Once the Board held a hearing on appellant's charges, Klundt's fundamental right to due process was met. Therefore, the order of the District Court dismissing appellant's complaint against the Board was proper.

Finally, appellant claims that the District Court erred in denying his Rule 52(b), M.R.Civ.P. motion to amend his complaint. Although appellant raises this argument, he cites no authority and makes no substantive arguments in support of this claim. Respondents argue that Rule 52(b) provides a method by which a district court's findings of fact can be amended. In this case, the District Court rendered judgment as a matter of law and no findings of fact were made. Therefore, the court's denial of the motion was proper. We agree with the respondents.

Appellant's motion can more properly be characterized as a Rule 15 motion to amend pleadings. Even so, the District Court's denial of the motion was proper. Klundt did not

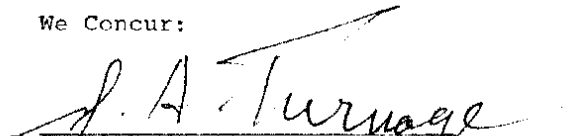


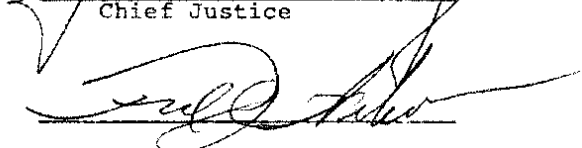
state how he wished to amend his complaint and did not provide the District Court with a proposed amended complaint. It was within the sound discretion of the District Court to deny appellant's motion.

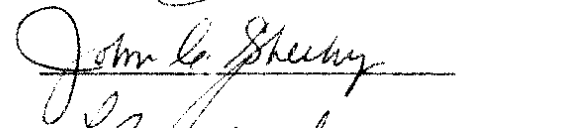
Therefore, the order of the District Court granting the Board's motion to dismiss is affirmed, and the order granting the Union's motion to dismiss is reversed.

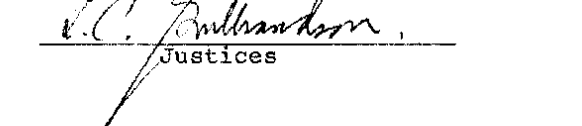
  
Justice

We Concur:

  
Chief Justice

  
Justice

  
Justice

  
Justice

No. 86-02

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

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IN THE MATTER OF UNFAIR LABOR  
PRACTICE NO. 38-80,

JERRY T. KLUNDT, affiliated  
with Chauffeurs, Teamsters, and  
Helpers Local Union #190,

Petitioner and Appellant,

-vs-

STATE OF MONTANA, BOARD OF  
PERSONNEL APPEALS, MONTANA  
STATE DEPARTMENT OF LABOR AND  
INDUSTRY; CITY OF BILLINGS,  
MONTANA,

Respondents and Respondents.

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APPEAL FROM: District Court of the Thirteenth Judicial District,  
In and for the County of Yellowstone,  
The Honorable Diane G. Barz, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Cate Law Firm; Brad L. Arndorfer, Billings, Montana  
D. Patrick McKittrick, Great Falls, Montana

For Respondents:

Daniel J. Stevenson, Dept. of Labor & Industry,  
Helena, Montana  
K.D. Peterson; Peterson, Schofield & Leckie,  
Billings, Montana

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Submitted on Briefs: April 10, 1986

Decided: June 19, 1986

Filed: JUN 19 1986

*Ethel M. Harrison*

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Clerk

Mr. Justice Fred J. Weber delivered the Opinion of the Court.

This appeal arises from Mr. Klundt's charges of unfair labor practices. The administrative hearing officer's recommendation that the charges be dismissed was adopted by the Board of Personnel Appeals (Board), and the Yellowstone County District Court affirmed the Board's decision. We remand to District Court.

These issues are raised:

1. Were Mr. Klundt's due process rights violated by the three year delay between the filing of his unfair labor practice charges and the administrative hearing on the charges; and did the District Court err in denying his application for leave to present additional evidence on this issue?

2. Is the Board's decision denying Mr. Klundt's claims supported by substantial credible evidence?

Mr. Klundt filed unfair labor practice (ULP) charges against his former employer, the City of Billings, in September 1980. In the charges, Mr. Klundt alleged that city officials took actions against him in March and April 1980 in retaliation for his union activity, that he was forced to quit his job in June 1980, and that the city would not rehire him in retaliation for filing the ULP charges. The City of Billings denied all charges.

In December 1983, a hearing officer for the Board held a hearing on Mr. Klundt's ULP charges. The hearing officer issued a recommended order ruling against Mr. Klundt and dismissing his charges. Then, in November 1984, the full Board held an oral argument on Mr. Klundt's challenge to the hearing examiner's decision. The Board adopted the hearing examiner's recommended order dismissing the complaint.

Mr. Klundt petitioned the Yellowstone County District Court for judicial review of the Board's decision. He also applied to the District Court for leave to present additional evidence. The court denied that application, finding that he had ample opportunity to present the evidence he sought to present. In October 1985, the District Court affirmed the Board's final order which denied Mr. Klundt's claims. This appeal followed.

I

Were Mr. Klundt's due process rights violated by the three year delay between the filing of his unfair labor practice charges and the administrative hearing on the charges; and did the District Court err in denying his application for leave to present additional evidence on this issue?

Mr. Klundt appeals the District Court's determination that his right to due process was not violated by the delay between the time he filed his ULP charges and the time his hearing was held. In an earlier appeal by Mr. Klundt the Court considered this identical issue:

Turning to appellant's allegations against the Board, Klundt claims that from the time he filed his charges until a hearing was held, he made numerous written and oral demands to the Board for a hearing. The Board failed to set a hearing for 37 months. The Board repeatedly stated that Klundt's charges had been put on hold at the request of the Union. Klundt alleges that this delay violated his due process rights under the state and federal constitutions.

The District Court properly granted respondent Board's motion for summary judgment. In Montana, the right to due process requires notice and an opportunity to be heard (citations omitted). The requirements are the same whether dealing with an administrative agency or a court. Section 2-4-601, MCA, and section 2-4-612(1), MCA. In this case, the Board fulfilled the fundamental requirements of due process. Klundt received notice and was given an opportunity to be heard. The three-year delay is disturbing, but not fatal.

Klundt v. State, ex rel., Bd. of Person. App. (Mont. 1986), 712 P.2d 776, 778-79, 43 St.Rep. 1, 3-4. Collateral estoppel bars the relitigation of an issue where the issue is identical to an issue previously decided, a final judgment as to the issue has been rendered, and the party against whom the claim is advanced remains the same or is a privy of the earlier party. Aetna Life and Cas. Ins. Co. v. Johnson (Mont. 1984), 673 P.2d 1277, 1280-81, 41 St.Rep. 40, 43-44. We hold that Mr. Klundt is precluded from raising this issue.

Mr. Klundt also asked for leave to present additional evidence relating to his due process claim. The District Court denied that motion. Because the additional evidence was to relate to the due process claim, and because of our holding on that issue, we conclude that this question is moot.

## II

Is the Board's decision denying Mr. Klundt's claims supported by substantial credible evidence?

Our standard of review is whether the factual findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Section 2-4-704(2)(e), MCA. This issue poses a real dilemma, because there is no transcript of the initial hearing where there was live testimony by actual witnesses. Mr. Klundt filed a motion to compel the transcript in District Court. The order which denied the transcript at the initial hearing stated:

The Court recognizes that counsel for the Petitioner may not have been present at the initial hearings in this case. The Court notes, however, that the record that has been transmitted by the Board reveals that counsel for Petitioner was present at the appeal before the Board. Further, the brief that counsel filed in connection with that appeal demonstrates knowledge of the testimony presented

to the hearing examiner. Counsel simply cannot now protest ignorance of the evidence presented at any stage of the proceedings below.

. . .

Accordingly, the Petitioner's Motion to Compel is GRANTED in part and DENIED in part: a certified copy of the transcript of the proceeding before the Board of Personnel Appeals, only, shall be ordered. The cost of this transcript shall be taxed to the Petitioner. (Emphasis supplied)

By order, the District Court affirmed the Board. In its accompanying memorandum it stated the court had carefully reviewed the entire case, including the complete administrative record of the Board. Apparently a tape of the hearing before the hearing examiner was available to the District Court.

However, on appeal, Mr. Klundt failed to designate the initial hearing as part of the record:

The petitioner, JERRY T. KLUNDT, hereby designates the record on appeal as follows:

1. The entire court file now held by the Clerk of Court of the above-entitled Court.

The petitioner states that there was a court reporter at the hearing held in the above-entitled matter, but that such record contains only the arguments of counsel and is therefore unnecessary for the appeal before the Montana Supreme Court.

Mr. Klundt asks this Court to review the evidence to determine if his union activities were the motivating factor in the reprisals against him, and also to determine if the reprisals would have taken place without his union activities. While Mr. Klundt did not specifically appeal from the order of the District Court refusing to order a transcript of the original hearing, the transcript is essential to any meaningful review of the evidence regarding his union activities and the purported reprisals. While all parties expend

significant portions of their briefs arguing on the sufficiency of the evidence, we cannot consider any of these arguments in the absence of a transcript of the testimony at the original hearing.

As the record now exists before us, our only choice is to affirm the District Court. From the briefs of Mr. Klundt we are not able to determine if he desires the opportunity to purchase a transcript of the original proceeding and have that matter considered. We therefore conclude:

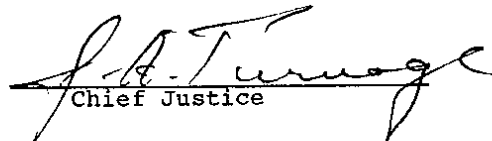
(1) This cause is remanded to the District Court. In the event that he desires to order and pay for a transcript of the hearing before the hearing examiner, Mr. Klundt shall appear before the District Court and make arrangements for the ordering and payment of the transcript. If he makes that election, the District Court shall examine the transcript when received and enter its further judgment on this issue.

(2) In the event that the attorney for Mr. Klundt shall fail to appear before the District Court and make the above described arrangements for the transcript of the hearing before the hearing examiner within 30 days from the date of this opinion, the judgment of the District Court is affirmed.

Remittitur shall now issue.

  
Justice

We Concur:

  
Chief Justice

